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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AUDUBON SOCIETY OR PORTLAND, WILDLIFE CENTER OF THE NORTH COAST, ANIMAL LEGAL DEFENSE FUND, CENTER FOR BIOLOGICAL DIVERSITY, FRIENDS OF ANIMALS,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS, U.S. FISH AND WILDLIFE SERVICE, USDA WILDLIFE SERVICES,

Defendants,

and

NORTHWEST RIVERPARTNERS,

Intervenor – Defendant.

Case No. 3:15-cv-00665-SI

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION'S UNOPPOSED MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

Expedited Hearing Requested

MOTION

The Confederated Tribes of the Colville Reservation ("Colville") move for leave to participate as *amicus curiae* in this case. As set forth in the memorandum below, Colville has significant rights and interests that will be affected by this litigation and desires to participate in order to provide the Court with its perspective on Plaintiffs' claims and requested relief.

Colville requests expedited hearing of its motion under LR 7-1(g). The schedule set by the Court for briefing the Plaintiffs' preliminary injunction motion (ECF No. 19) requires Federal Defendants and Intervenor-Defendant to file responses to Plaintiffs' motion by noon on May 6, 2015 and argue the motion before the Court on May 8 (ECF No. 18). Colville supports the U.S. Army Corps of Engineers' (Corps) cormorant management plan challenged in this action and, if granted *amicus* status in the case, would submit a response brief providing information based on the Tribes' multiple years of engagement on Columbia basin avian predation management issues and longstanding salmon restoration efforts in the upper Columbia. Colville believes that its participation in this litigation will be useful in the Court's resolution of Plaintiffs' claims, including the pending motion for preliminary injunctive relief. In order to meaningfully participate in the hearing of the preliminary injunction motion, Colville would need leave to participate granted in advance of those deadlines.

Colville agrees to accept and be bound by all existing orders, procedures, and schedules that have been established in this litigation to date.

The undersigned counsel has contacted counsel for all parties of record in this litigation to ascertain whether there is any objection to this motion. Counsel for Plaintiffs, the Federal

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Defendants and Intervenor-Defendant Northwest Riverpartners indicated that they do not oppose the motion.

MEMORANDUM

I. INTRODUCTION.

Colville has a unique perspective on the Federal Columbia River Power System (FCRPS) and the aspects of the FCRPS raised by Plaintiffs' complaint and preliminary injunction motion. Since November 2005, Colville has participated as *amicus curiae* before this Court in the *NWF v. NMFS* litigation involving multiple FCRPS Biological Opinions (BiOp). Colville has witnessed firsthand the devastation wrought by the FCRPS, which eliminated once abundant salmon runs from large portions of the Colville Reservation through the construction of Grand Coulee Dam in the early 1940s and later Chief Joseph Dam. Colville has also witnessed record returns of summer/fall Chinook and sockeye to the Okanogan River basin in recent years, confirming the Tribes' view that the future of salmon and steelhead in the Columbia is bright – even for those that must pass nine dams twice in their lifetime.

From this vantage point, Colville has actively engaged in the region's effort to protect and restore salmon and steelhead and has committed to doing its part for the massive basin-wide program to mitigate the effects of the FCRPS on species of salmon and steelhead listed under the Endangered Species Act (ESA). This effort must – and Colville believes it will – succeed. Although some salmon populations are returning to the Colville Reservation in large numbers, others are still at risk.

Colville is committed to supporting the FCRPS BiOp's Reasonable and Prudent Alternative (RPA), including RPA 46 as modified in the 2014 FCRPS BiOp. To that end,

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Colville has participated in the development of the Corps of Engineers' management plan for cormorants on East Sand Island via government-to-government consultation, participation in the Federal agency work group convened to collaborate on the management plan's preparation, and submission of extensive comments on drafts of the environmental impact statement (EIS) prepared for the cormorant management plan.

The avian predation issue is of great importance to Colville. The Tribes are deeply concerned about the impact that cormorants and other avian species throughout the Columbia River basin are having on salmon and steelhead populations that Colville has a federally reserved right to harvest and which form a core part of Colville subsistence and ceremonies. Colville has made a substantial investment, along with the Corps of Engineers and other federal agency partners, in recovering salmon and steelhead in the upper Columbia, including many projects to restore Upper Columbia River steelhead habitat in the Okanogan River basin and the design and construction of a major new hatchery at Chief Joseph Dam. A management plan for double-crested cormorants that protects the gains in fish survival we have worked so hard to achieve is essential – for the Tribes' well-being and for the Corps to meet its trust responsibility to uphold the Tribes' rights and interests.

II. LEGAL STANDARD.

Amicus participation should normally be allowed where, as here, a party is not represented at all or the *amicus* has unique information or perspective that can help the court beyond what is provided by the lawyers for the parties. *Community Ass'n for Restoration of the Envt. v. DeRuyter Brothers Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (citing *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir.1982)). "The privilege of

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being heard *amicus* rests in the discretion of the court which may grant or refuse leave accordingly as it deems the proffered information timely, useful, or otherwise." *Id.* (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982)).

III. ARGUMENT

Colville is a federally recognized Indian tribe which occupies a Reservation in north-central Washington established by Executive Order in 1872. *See* Declaration of Randall Friedlander ¶ 2. Colville holds federal reserved rights to harvest anadromous fish from that portion of Columbia River within the Colville Reservation where such fish are still present (a roughly 5-mile stretch from Chief Joseph Dam downstream to the confluence with the Okanogan River), and from the entire length of the Okanogan River within the United States (including both the on-reservation portion of that river as well as a ceded portion north of the current Reservation boundary). *See Antoine v. Washington*, 420 U.S. 194 (1975) (federally protected fishing and hunting rights on the former North Half); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) ("preservation of the tribe's access to fishing grounds was one purpose for the creation of the Colville Reservation"); *see also* Friedlander Decl. ¶ 2. The Wenatchi Tribe, which is one of twelve Colville constituent tribes, possesses federally protected fishing rights at the Wenatshapam Fishery ("Wenatshapam") on Icicle Creek, a tributary to the Wenatchee River, below the Leavenworth National Fish Hatchery. *Id.* ¶ 3. The Wenatchis' right to fish at Wenatshapam was reserved and acknowledged in an 1894 Agreement with the United States, and the fishery is the Tribes' only opportunity to harvest the culturally and nutritionally important spring Chinook. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 530-31 (9th Cir. 2010); Friedlander Decl. ¶ 3.

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Colville has a fundamental interest in restoration and recovery of anadromous fish in the mainstem Columbia River below Chief Joseph Dam. Colville culture, religion and subsistence are intricately linked with the salmon and steelhead runs of the Columbia basin. Until the development of the Grand Coulee Dam, anadromous fish were present throughout Colville's reserved fishing areas within the Reservation and former North Half. Grand Coulee Dam blocked anadromous fish passage as of 1942 to most of the Tribes' harvest area in the upper Columbia, and eliminated anadromous fish from over 1100 miles of habitat above Grand Coulee. Subsequently, Chief Joseph Dam blocked anadromous fish passage on the Columbia further downstream, leaving only 5 river miles of the Columbia where anadromous fish are still present within the Colville Reservation. Anadromous fish are still present throughout the entire length of the Okanogan River. Spring Chinook are central to the Tribes' first salmon ceremonies; however, no runs of spring Chinook currently return to the Colville Reservation. Friedlander Decl. ¶ 4.

Upper Columbia River (UCR) steelhead are listed as threatened under the ESA, and UCR spring Chinook salmon are listed as endangered. The anadromous fish that originate within or upstream from the Colville Reservation must migrate the farthest of all fish in the Columbia basin if they are to survive and return to their natal waters to reproduce. They must overcome more obstacles and barriers than fish from farther downstream in the basin. Unless steelhead and spring Chinook return to Colville Reservation or North Half waters in sufficient numbers to allow for subsistence and ceremonial harvest by Colville tribal members, Colville's federally-protected fishing rights will fail to secure their intended benefit – they will be mere paper rights representing yet another broken promise to the Colville people. Friedlander Decl. ¶ 8.

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Colville's unwavering commitment to restoring anadromous fish within the Colville Reservation and in the upper Columbia basin led the Tribes to actively participate in the FCRPS remand collaboration process beginning in 2005 with the goal of awakening the federal government to the recovery needs of endangered UCR spring Chinook and threatened UCR steelhead. Colville entered into a historic Fish Accord with the federal action agencies, including the Corps, and has undertaken major protects under the Accord to enhance Chinook and steelhead populations in the upper Columbia. Friedlander Decl. ¶¶ 9, 10.

Under the Fish Accord, Colville has greatly increased its long-standing habitat restoration work in the Okanogan River basin. Colville has planned, designed, and implemented numerous projects in the Okanogan basin, opening tributary reaches inaccessible for decades, providing additional flows, and protecting riparian habitat. Completed projects have already demonstrated immediate benefits to UCR steelhead, now that they are able to access some of the most important habitat in the basin. *Id.* ¶ 10.

In 2013, Colville completed over a decade of planning and construction of Chief Joseph Hatchery (CJH). CJH is dedicated in part to increasing the number of spring Chinook returning to the upper Columbia, and at full production will have the capacity to rear up to 700,000 fish annually in its segregated spring Chinook program and 2.9 million Chinook in total. Spring Chinook from Leavenworth National Fish Hatchery have been reared at CJH since 2013 and Colville just recently released the first yearling spring Chinook reared at the hatchery to the Columbia and Okanogan Rivers. Friedlander Decl. ¶ 11.

Colville recognizes that avian predation of ESA-listed (and non-listed) salmonids in the Columbia River estuary is a problem that requires decisive action. Cormorants in the Columbia

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River estuary are having a disproportionate impact on UCR steelhead, undermining Colville's work to restore the steelhead population native to the Okanogan River. Furthermore, spring Chinook released from Chief Joseph Hatchery will have to run the avian gauntlet in the estuary in order to return to the upper Columbia. Friedlander Decl. ¶ 12. Thus, for the past three years, Colville has been advocating for the Corps and the U.S. Fish and Wildlife Service to take an aggressive approach to avian predation management. In particular, Colville has expressed concerns that the agencies are addressing the issue as a bird problem, when the Tribes see it as a fish problem. Friedlander Decl. ¶ 13. There are currently three FCRPS BiOp RPA actions addressing avian predation other than at the dams themselves, including RPA 46, which calls for the development and implementation of warranted actions related to cormorants at East Sand Island, *i.e.* the Cormorant Plan. The 2014 BiOp modified this RPA to include specific targets for reducing the cormorant population nesting on East Sand Island – the largest cormorant colony in North America – to base period levels.

Colville engaged the Corps in government-to-government consultation over the Cormorant Plan in December 2012. Since that time, Colville has submitted at least five comment letters to the Corps as part of the NEPA process surrounding development of the Cormorant Plan. Friedlander Decl. ¶ 14 and Ex. A. Colville representatives have participated in numerous meetings of the Avian Working Group, which consists of representatives of federal, tribal and state agencies, to discuss the preparation of the Cormorant Plan. Throughout those comments and meetings, Colville has repeatedly advocated for a more "fish-centered" approach to avian predation in general, and specifically for an aggressive reduction of the Estuary cormorant population by 90%, using lethal take of adults and egg removal. Friedlander Decl. ¶

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15 and Ex. A at pg. 5. Although Colville advocated for greater reduction of the East Sand Island nesting colony than was ultimately adopted by the Corps in the Cormorant Plan, Colville supports the plan and believes it is an essential part of the broader effort to protect listed salmon and steelhead in the Columbia basin. Friedlander Decl. ¶ 15.

Colville's extensive participation in all stages of the development of the Cormorant Plan, and its unique interests in the recovery of anadromous fish in the upper Columbia would assist the Court in resolving Plaintiffs' claims. In particular, Colville would contribute to the Court's understanding of the context in which the Corps prepared and adopted the Cormorant Plan and the importance of that plan to Colville's (and the region's) effort to restore salmonid populations and upholding the Tribes' federally protected fishing rights.

IV. CONCLUSION

For all of the foregoing reasons, Colville's motion for leave to participate as *amicus curiae* should be granted.

Respectfully submitted this 4th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties in this matter who are registered with the Court's CM/ECF filing system.

s/ Brian C. Gruber

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